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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION FOUR

MICHAEL N. BERKE et al., Plaintiffs and Appellants, v. BANK OF AMERICA et al., Defendants and Respondents.	B253357 (Los Angeles County Super. Ct. No. PC051792)

APPEAL from a judgment of the Superior Court of Los Angeles County, Randy Rhodes, Judge. Affirmed.

Law Offices of Louis J. Esbin, Louis J. Esbin, for Plaintiffs and Appellants; Law Office of Michael N. Berke, Michael N. Berke, for Plaintiff and Appellant Gail M. Berke; Michael N. Berke, in pro. per.

McGuireWoods, Leslie M. Werlin, Grace B. Kang and Seth P.Cox, for Defendants and Respondents.

Michael and Gail Burke appeal from a judgment of dismissal. They argue the trial court erred in sustaining the demurrer to the fourth amended complaint by respondents Bank of America, N.A. (BOA) and Aurora Loan Services, LLC (Aurora), and in denying appellants' motion to compel additional document production. We find no error and affirm.

FACTUAL AND PROCEDURAL SUMMARY

As alleged in the operative complaint, appellants bought their home in Santa Clarita for $950,000 in 1999. They borrowed 80 per cent of the purchase price from Countrywide Home Loans, Inc. (Countrywide). Between April and June 2006, appellants refinanced their loan in the sum of $1.1 million. They worked with Ed Peisner and Adam Halem, loan brokers at Todd Olson Realty, who represented Countrywide. To justify the loan amount, the loan brokers convinced a Countrywide subsidiary to increase the appraised value of the property from $2 million to $2.2 million. The brokers assured appellants the loan was "good," appellants would be "happy" with it, the property would continue to appreciate in value, and appellants would be able to refinance if interest rates improved. Appellants were not warned that lenders were making increasingly risky loans that would cause a decline in property values.

In November 2006, appellants obtained a $750,000 home equity line of credit from Washington Mutual Bank (WaMu), on which $543,000 was advanced. In relation to the line of credit, a subsidiary of WaMu appraised the property at $2.4 million. A WaMu loan broker allegedly made representations similar to those made by the Countrywide brokers and failed to disclose WaMu's risky lending practices.

Over the years, appellants invested over $700,000 in home renovations. At the end of 2006, in reliance on WaMu's appraisal, they listed the property for sale at $2.8 million, and it remained listed at that price until April 2007. Appellants received no offer sufficient to satisfy the loan and line of credit and return any of their equity.

In February 2008, WaMu denied appellants access to the remaining balance on the credit line, advising them that the value of the home had declined and no longer

supported the full $750,000 credit. As a result, appellants' credit score dropped by 100 points.

In 2010, appellants contacted BOA and JPMorgan Chase Bank, N.A. (Chase), which had acquired the Countrywide loan and WaMu line of credit respectively, for a loan modification under the Making Home Affordable Program (HAMP). A representative of BOA, or of its loan servicer, identified only as Sharonda, told them on the phone there were no programs available to modify the terms of their loan because it was not in default. They were told the same with regard to the line of credit. In an attempt to qualify for a loan modification under HAMP, appellants stopped making payments on the loan and line of credit, which further reduced their credit scores. They were then told that super jumbo loans, like theirs, did not qualify for loan modification under any program. In November 2011, appellants' home was sold at a short sale for $1,154,827.67.

In October 2011, appellants sued respondents[1] and Chase for fraud, negligent misrepresentation, breach of contract, and unjust enrichment. In 2012, the court granted in part and denied in part appellants' motion to compel document production. After several demurrers to earlier versions of the complaint were sustained with leave to amend, appellants filed a fourth amended complaint in 2013.

As in previous versions of the complaint, the fourth amended complaint relied on a 2011 report of the federal Financial Crisis Inquiry Commission (FCIC) about the causes of the Great Recession (the FCIC report).[2] Using information from that report, appellants

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[1] The only allegation against Aurora is that it acquired some unidentified right or interest in the Countrywide loan.

[2] The FCIC, "a ten-member panel comprised of private citizens with experience in housing, economics, finance, market regulation, banking, and consumer protection, was established as part of the Fraud Enforcement and Recovery Act, Pub.L. No. 111–21 (2009), to 'examine the causes, domestic and global, of the [then] current financial and economic crisis in the United States.' Fraud Enforcement and Recovery Act of 2009, Pub.L. No. 111–21, § 5, 121 Stat. 1617." (*Investment Co. Institute v. U.S. Commodity Futures Trading Comm.* (D.D.C. 2012) 891 F.Supp.2d 162, 172, fn. 7.)

asserted a cause of action for fraud based on nondisclosure of material facts—namely, that Countrywide brokers failed to disclose that risky lending practices would lead to a collapse of property values and appellants' loss of equity in their home. Appellants asserted claims for intentional and negligent misrepresentation based on the alleged unrealistic appraisals of the property and the brokers' representations that appellants' investment was good and would increase in value. The statement that the loan needed to be in default to be considered for loan modification was alleged as an alternative basis for the claim of negligent misrepresentation, and as an excuse for nonperformance, on theories of promissory estoppel and inducement to breach. Appellants claimed respondents committed breach of contract and breach of the implied duty of good faith and fair dealing by destroying the value of appellants' property. Appellants also claimed respondents violated the Unfair Competition Law (Bus. & Prof. Code, § 17200, et seq., (UCL)) because lenders, acting in concert, had created a "Ponzi scheme" to artificially increase the value of all real property.

Appellants variously claimed that they were damaged by overencumbrancing their property, losing their equity and good credit rating, and expending money to make payments on the loans, maintain the property, and pay taxes due to the inability to sell it over several years. They sought $1 million in damages for their loss of equity, with prejudgment interest from April 30, 2006.

Respondents demurred on the grounds that appellants failed to state a cause of action, and that the fraud, misrepresentation, and UCL claims were time barred. (Code Civ. Pro., § 430.10, subd. (e).) The court sustained respondents' demurrer without leave to amend. It declined to take judicial notice of the FCIC report and of the facts alleged in complaints filed in a federal *qui tam* case against Countrywide and BOA. (See *United States v. Countrywide Fin. Corp.* (S.D.N.Y. 2013) 961 F.Supp.2d 598.) It found irrelevant the conclusion of the federal district court that the government's complaint in that case alleged sufficient facts to withstand a motion to dismiss.

The court concluded the fraud and misrepresentation claims, as well as the UCL claim, were time barred. It rejected appellants' contention that they could not have

known of respondents' lending practices until the FCIC report came out, noting that appellants were placed on notice when they could not sell their home in 2006 and when, in 2008, they were advised that its value had decreased. Alternatively, the court concluded appellants had failed to state a cause of action for fraud or misrepresentation because a lender does not owe a duty of care to a borrower, a broker is not the lender's agent, and the facts pled did not show that a knowing misrepresentation caused appellants' damages. The court found appellants had not alleged they had standing to sue under the UCL because the loss they suffered was due to their own breach.

The court rejected appellants' inducement to breach claim because inducement to breach cannot be committed by a party to a contract. It concluded that appellants had failed to plead facts showing an unambiguous promise in order to state a claim of promissory estoppel, and had not identified a contractual term that respondents breached. The court concluded that appellants' voluntary breach of the loan agreement precluded contract damages. The court noted that the operative complaint failed to make specific allegations as to Aurora.

This appeal followed the judgment of dismissal.

DISCUSSION

When an appeal is taken from a judgment of dismissal following the sustaining of a demurrer without leave to amend, we determine de novo whether the complaint states facts sufficient to constitute a cause of action, and whether the court abused its discretion in denying leave to amend. (*Loeffler v. Target Corp*. (2014) 58 Cal.4th 1081, 1100.) We treat the demurrer as admitting all material facts properly pleaded, but not the truth of contentions, deductions or conclusions of law. (*City of Dinuba v. County of Tulare* (2007) 41 Cal.4th 859, 865.) We also consider matters which may be judicially noticed; however judicial notice is '"dispositive only in those instances where there is not or cannot be a factual dispute concerning that which is sought to be judicially noticed. [Citation.]"' (*Joslin v. H.A.S. Ins. Brokerage* (1986) 184 Cal.App.3d 369, 375.)

"The plaintiff has the burden of showing that the facts pleaded are sufficient to establish every element of the cause of action and overcoming all of the legal grounds on

which the trial court sustained the demurrer, and if the defendant negates any essential element, we will affirm the order sustaining the demurrer as to the cause of action. [Citation.] We will affirm if there is any ground on which the demurrer can properly be sustained, whether or not the trial court relied on proper grounds or the defendant asserted a proper ground in the trial court proceedings. [Citation.]" (*Martin v. Bridgeport Community Assn., Inc.* (2009) 173 Cal.App.4th 1024, 1031.)

I

With one exception, appellants' fraud and misrepresentation claims against respondents are based on the 2006 refinancing of their Countrywide loan. Respondents argue the claims are time barred by the three-year statute of limitation for fraud. (Code Civ. Proc. § 338, subd. (d).) Appellants contend they have sufficiently alleged delayed discovery.

A. Statute of Limitation

A statute of limitation begins to run when the cause of action accrues. (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 806.) A cause of action accrues when it is '"complete with all of its elements. [Citation.]"' (*Ibid*.) The statute of limitation for fraud is three years from the discovery of the facts constituting the fraud.[3] (Code Civ. Proc. § 338, subd. (d).) This delayed discovery rule "postpones accrual of a cause of action until the plaintiff discovers, or has reason to discover, the cause of action. [Citations.]" (*Fox v. Ethicon Endo-Surgery, Inc.* (2005) 35 Cal.4th 797, 807.) "To excuse failure to discover the fraud within three years after its commission, a plaintiff also must plead 'facts showing that he was not negligent in failing to make the discovery sooner and that he had no actual or presumptive knowledge of facts sufficient to put him on inquiry.' . . . The discovery-related facts should be pleaded in detail to allow the court

[3] A cause of action for negligent misrepresentation is barred by the two-year statute of limitation (Code Civ. Proc., § 339) where information is provided for business purposes in a commercial setting, and the allegations amount to a claim of professional negligence. (*Hydro-Mill Co., Inc. v. Hayward, Tilton & Rolapp Ins. Associates, Inc.* (2004) 115 Cal.App.4th 1145, 1155.)

to determine whether the fraud should have been discovered sooner. [Citation.]" (*Cansino v. Bank of America* (2014) 224 Cal.App.4th 1462, 1472.)

The parties proceed on the assumption that the fraud and negligent misrepresentation causes of action accrued in 2006, unless delayed discovery postponed their accrual. To that end, appellants allege that, before 2011, they had no reason to suspect that their home "was overvalued for the amount of the indebtedness or that the Defendants, and each of them, in a concerted effort and pursuant to business plan first disclosed to the FCIC, had engaged in making fraudulent loans that would not be paid and that would cause the demise of among others, Plaintiffs' home value."

Such allegations are insufficient to plead delayed discovery because "[t]he statute of limitations begins to run when the plaintiff has information which would put a reasonable person on inquiry. A plaintiff need not be aware of the specific facts necessary to establish a claim since they can be developed in pretrial discovery." (*Kline v. Turner* (2001) 87 Cal.App.4th 1369, 1374.) Appellants were placed on notice that their home was overvalued when it failed to sell in 2006 and 2007. WaMu further notified them in February 2008 that the home had depreciated. Appellants' conclusory claim that WaMu's "self assessment" of the decline in the home's value was not a "red flag" is unavailing. "In assessing the sufficiency of the allegations of delayed discovery, the court places the burden on the plaintiff to 'show diligence'; 'conclusory allegations will not withstand demurrer.' [Citation.]" (*Fox v. Ethicon Endo-Surgery, Inc., supra,* 35 Cal.4th at p. 808.)

Appellants' reliance on the 2011 FCIC report as the only means of discovery of information about questionable loan origination practices is misplaced as information about those practices was publicly available in 2007 and 2008. (See e.g. *Stichting Pensioenfonds ABP v. Countrywide Financial Corp.* (C.D. Cal. 2011) 802 F.Supp.2d 1125, 1137–1139 [taking judicial notice of early investor and shareholder cases against Countrywide]; see also *In re Countrywide Financial Corp. Securities Litigation* (C.D. Cal. 2008) 588 F.Supp.2d 1132, 1145; *In re Countrywide Financial Corp. Derivative Litigation* (C.D. Cal. 2008) 554 F.Supp.2d 1044, 1066.) Appellants cite the FCIC's

reference to a 2007 complaint disclosing WaMu's practice of inflating appraisals. (See *People v. First Am. Corp.* (N.Y. App. Div. 2010) 76 A.D.3d 68, 70.) Appellants have not alleged they diligently investigated the information that was available to the public as early as 2007 and 2008. (Cf. *Marino v. Countrywide Fin. Corp.* (C.D. Cal. 2014) 26 F.Supp.3d 955, 962 [information about Countrywide available in 2007 and 2008 negated delayed discovery].)

Were we to assume, as the parties do, that appellants' damages accrued in 2006, the fraud and intentional misrepresentation causes of action would be barred by the statute of limitation, and the delayed discovery rule would not postpone accrual past 2007 or early 2008. The original complaint was filed in October 2011, more than three years later, by which time the statute of limitation for fraud had run. Nevertheless, the statute of limitation would not bar the negligent misrepresentation claim, which is based in part on a representation made in 2010. (See *Fox v. JAMDAT Mobile, Inc.* (2010) 185 Cal.App.4th 1068, 1078 [demurrer does not lie to part of cause of action].)

Appellants' main request for relief is based on the loss of equity in their home, which did not materialize into actual damages until the short sale of the property in 2011. Where "damages are an element of a cause of action, the cause of action does not accrue until the damages have been sustained. [Citation.] 'Mere threat of future harm, not yet realized, is not enough.' [Citation.] . . . Therefore, when the wrongful act does not result in immediate damage, 'the cause of action does not accrue prior to the maturation of perceptible harm.' [Citations.]" (*City of Vista v. Robert Thomas Securities, Inc*. (2000) 84 Cal.App.4th 882, 886.) Because the allegations of the complaint must be liberally construed in favor of the plaintiff (*Venice Town Council, Inc. v. City of Los Angeles* (1996) 47 Cal.App.4th 1547, 1557), we assume that appellants were not actually damaged by the loss of equity in their home and, hence, their claims did not accrue until the home was sold in 2011. We, therefore, proceed to consider the fraud and negligent misrepresentation claims on the merits.

B. Fraud based on Nondisclosure of Material Facts

The elements of a cause of action for fraud based on concealment are: "'''''(1) the defendant must have concealed or suppressed a material fact, (2) the defendant must have been under a duty to disclose the fact to the plaintiff, (3) the defendant must have intentionally concealed or suppressed the fact with the intent to defraud the plaintiff, (4) the plaintiff must have been unaware of the fact and would not have acted as he [or she] did if he [or she] had known of the concealed or suppressed fact, and (5) as a result of the concealment or suppression of the fact, the plaintiff must have sustained damage.''''' (*Bank of America Corp. v. Superior Court* (2011) 198 Cal.App.4th 862, 870, citations omitted.)

Appellants claim that Countrywide brokers had superior knowledge and a duty to disclose that Countrywide's risky lending practices would lead to collapse of the real estate market. There are several problems with this claim. First, appellants' allege that Countrywide and WaMu "conspired" through their loan brokers to not disclose information which Countrywide's officers and executives later revealed to the FCIC. This conclusory allegation is insufficient to establish that the two loan brokers at Todd Olson Realty who allegedly acted as agents for Countrywide were aware of the condition of the entire real estate market or were able to predict the imminence or extent of its eventual depression. Appellants' citations to the FCIC report in the operative complaint do not help the case because they do not show that housing prices had stopped rising by mid-2006 or that there was a "panic" in the credit markets before mid-2007.

Second, "as a general rule, a financial institution owes no duty of care to a borrower when the institution's involvement in the loan transaction does not exceed the scope of its conventional role as a mere lender of money. [Citations.]" (*Nymark v. Heart Fed. Savings & Loan Assn.* (1991) 231 Cal.App.3d 1089, 1096.) Nothing in the operative complaint indicates that in refinancing appellants' loan, Countrywide exceeded its traditional role as a lender of money. As a lender, it had no duty to warn appellants that their investment would be unsafe. (See *ibid.* ["lender has no duty to disclose its knowledge that the borrower's intended use of the loan proceeds represents an unsafe

investment"].) Nor did it have a duty to warn appellants of its own intent to commit tortious acts. (See *Bank of America Corp. v. Superior Court, supra*, 198 Cal.App.4th at p. 872 [Countrywide had no duty to disclose to borrowers that it would sell mortgage pools at inflated values].) Countrywide's general participation in the real estate market does not establish a continuing relationship with appellants because there is no allegation it actively participated in any home improvement or other enterprise financed by the loan. (See *Nymark v. Heart Fed. Savings & Loan Assn*., *supra*, 231 Cal.App.3d at p. 1097.)

Appellants' reliance on *Jolley v. Chase Home Finance, LLC* (2013) 213 Cal.App.4th 872 is misplaced. That case involved a lender's negligent acts during the disbursement and modification of a construction, rather than a residential loan (*id*. at p. 901), and has been criticized for suggesting that loan modification is not a conventional lending activity. (See *Lueras v. BAC Home Loans Servicing, LP* (2013) 221 Cal.App.4th 49, 67.) The soundness of its analysis aside, *Jolley* did not consider the lender's duties at loan origination, and it is not authority for imposing on a lender a duty to warn borrowers about the general condition of the real estate market. (*Sonic-Calabasas A, Inc. v. Moreno* (2013) 57 Cal.4th 1109, 1160 [cases are not authority for propositions not considered].)

Boschma v. Home Loan Center, Inc. (2011) 198 Cal.App.4th 230, 250 also is distinguishable because it involved the duty to disclose the terms of plaintiff's own loan under the Truth in Lending Act (15 U.S.C. § 1601 et seq.). In dictum, the court also referenced the common law duty not to make partial, misleading representations. (*Boschma*, at p. 250.) Unlike *Boschma*, this case is not based on a nondisclosure or a partial disclosure of the terms of appellants' own loan.

Third, to the extent appellants allege that Countrywide's irregular practices, along with those of other lenders, injured appellants by "depress[ing] real estate values in California," appellants do not establish a nexus between the nondisclosure of such practices and the loss of equity in their home, because home owners suffered a decline in their equity whether or not they obtained a loan from Countrywide. (*Bank of America Corp. v. Superior Court, supra*, 198 Cal.App.4th at p. 873.) Appellants do not allege a

clear nexus between the short sale of the home in 2011 and the nondisclosure of market conditions in 2006.

C. Intentional or Negligent Misrepresentations

"Negligent misrepresentation is a form of deceit, the elements of which consist of (1) a misrepresentation of a past or existing material fact, (2) without reasonable grounds for believing it to be true, (3) with intent to induce another's reliance on the fact misrepresented, (4) ignorance of the truth and justifiable reliance thereon by the party to whom the misrepresentation was directed, and (5) damages. [Citation.]" (*Fox v. Pollack* (1986) 181 Cal.App.3d 954, 962.) Intentional misrepresentation has the same elements, except that it requires a '"knowledge of falsity (or 'scienter'). [Citation.]"' (*Lazar v. Superior Court* (1996) 12 Cal.4th 631, 638.)

1. Appraisal

To the extent appellants allege that Countrywide brokers engineered an increase of the appraised value of the home from $2 to $2.2 million, appellants have not alleged that the appraisal was performed for their benefit or that they actually and justifiably relied on it.

"An appraisal is performed in the usual course and scope of the loan process to protect the *lender's* interest to determine if the property provides adequate security for the loan. Since the appraisal is a value opinion performed for the benefit of the lender, there is no representation of fact upon which a buyer may reasonably rely. 'While it [is] foreseeable the appraisal might be considered by plaintiff in completing the loan transaction, the foreseeability of harm [is] remote. Plaintiff [is] in as good a position as . . . defendant to know the value and condition of the property. One who seeks financing to purchase real property has many means available to assess the property's value and condition, including comparable sales, advice from a realtor, independent appraisal, contractors' inspections, personal observation and opinion and the like. . . . Stated another way, the borrower should be expected to know that the appraisal is intended for the lender's benefit to assist it in determining whether to make the loan, and not for the purpose of ensuring that the borrower has made a good bargain, i.e., not to

insure the success of the investment.'" (*Graham v. Bank of America, N.A.* (2014) 226 Cal.App.4th 594, 607, quoting *Nymark v. Heart Fed. Savings & Loan Assn.*, *supra*, 231 Cal.App.3d at p. 1099.)

The various versions of the complaint contain some inconsistent allegations. In the first three iterations, appellants alleged that the property was listed for sale at $2.8 million in early April 2006, which predated any alleged appraisal by Countrywide or WaMu. In the third and fourth amended complaints, appellants alleged the property was listed for sale at $2.8 million in November 2006, in reliance on WaMu's appraisal of $2.4 million. Under the sham pleading doctrine, a plaintiff may not avoid a defect in the original complaint by pleading inconsistent facts, and the original defect, unless explained, may be read into the amended complaint. (*Banis Restaurant Design, Inc. v. Serrano* (2005) 134 Cal.App.4th 1035, 1044.) Even assuming the original listing date was alleged in error, the amended allegations show appellants relied on the higher WaMu appraisal, rather than on the lower Countrywide appraisal.

In the fourth amended complaint, appellants allege that the original appraisal value of $2 million was increased because the property had been appraised at $2.1 million the previous year. Appellants do not allege that the $2.1 million appraisal was inflated or that property values had decreased between 2005 and 2006. Appellants also allege that a Countrywide broker insisted on a higher appraisal value because "the borrower is pulling the loan and going back to WAMU." This allegation suggests that Countrywide was competing with WaMu for the loan, that appellants were playing one lender against another, and that Countrywide increased the value of the property in order to retain appellants' business, rather than to ensure the success of their investment.

2. Expressions of Opinion

As instances of affirmative misrepresentation, appellants cite the brokers' assurances that the loan was "good," appellants would be "happy" with it, the property would continue to appreciate in value, and refinancing into a better loan would be possible if interest rates changed. It is unclear how the last statement is relevant to appellants' claims as there are no allegations that appellants sought to refinance the loan

due to changing interest rates. The other three statements are expressions of opinion or predictions about market values, which generally are not actionable as misrepresentations of fact. (*Neu-Visions Sports, Inc. v. Soren/McAdam/Bartells* (2000) 86 Cal.App.4th 303, 308.) An exception to the general rule exists for expressions of opinion by a party with superior knowledge or special information regarding the subject of the representation. (*Ibid*.)

Appellants allege in conclusory terms that the brokers knew or should have known Countrywide's practices would depress the real estate market. However, "[l]ike acts of nature and their consequences, the future state of a financial market is unknown. Any future market forecast must be regarded not as fact but as prediction or speculation. [Citation.]" (*Cansino v. Bank of America*, *supra*, 224 Cal.App.4th at p. 1470.) Even assuming the loan brokers had superior knowledge about the quality of the loans Countrywide had been issuing, we see no reason to infer that they knew an economic depression was imminent; nor is there a basis to conclude that loan brokers have expertise to predict with any accuracy the future state of the financial and real estate markets.

As to the brokers' assurances that the loan was "good" and appellants would be "happy" with it, we note that such vague and subjective generalizations are '"not the sort of statement that a consumer would interpret as factual or upon which he or she could reasonably rely.'" (*Cansino v. Bank of America*, *supra,* 224 Cal.App.4th at p. 1471; see also *Demetriades v. Yelp, Inc.* (2014) 228 Cal.App.4th 294, 311 ["'a statement that is quantifiable, that makes a claim as to the "specific or absolute characteristics of a product," may be an actionable statement of fact while a general, subjective claim about a product is non-actionable puffery'"].) Appellants do not allege that the refinanced loan was intrinsically bad or that it would not have performed well had property values continued to increase, and it is unreasonable to infer that the brokers had superior knowledge about what would make appellants happy.

3. Misrepresentation of HAMP Requirements

Appellants complain that in 2010, a representative of BOA or of a third-party unidentified servicer, who identified herself as Sharonda, incorrectly informed them that

"because the Loan was not in default there were no programs available to modify the terms of the Loan, unless they stopped making payments." HAMP, the program appellants specifically reference, applies to "homeowners who are in default or at imminent risk of default." (*Bushell v. JPMorgan Chase Bank, N.A.* (2013) 220 Cal.App.4th 915, 923.)

To the extent the requirement that a loan be in default represents prioritization by BOA, or its servicer, of loans for modification, Sharonda's statement is not necessarily a misrepresentation of the lender's or servicer's actual practice. Some courts have found nothing wrong with such a practice. (See *Whatley v. Bank of America, N.A.* (E.D. Cal. Nov. 26, 2012, No. 2:11-cv-02901-MCE-GGH) 2012 WL 5906709 ["it seems reasonable for [lender] to require delinquency before modifying a loan"]; *Lindsay v. Bank of America N.A.* (D. Haw. Oct. 19, 2012, No. 12-00277 LEK-BMK) 2012 WL 5198160 [lenders "are within their rights . . . to prioritize the processing of loan modification applications according to the needs of their borrowers"].) But even assuming that the practice of prioritizing modification of loans in default is problematic, advising borrowers of that practice is not a misrepresentation of fact.

To the extent Sharonda misstated HAMP's actual requirements, the question is whether appellants' reasonably relied on her misstatement to their detriment. '"[A] party plaintiff's misguided belief or guileless action in relying on a statement on which no reasonable person would rely is not justifiable reliance . . . . "If the conduct of the plaintiff in the light of his own intelligence and information was manifestly unreasonable, . . . he will be denied a recovery."' [Citation.] A mere 'hopeful expectation[ ] cannot be equated with the necessary justifiable reliance.' [Citation.]" (*Aceves v. U.S. Bank, N.A.* (2011) 192 Cal.App.4th 218, 227.)

Appellants contend their reliance was reasonable because it was consistent with the BOA website, which states that "modification programs [ ] may be available to qualifying borrowers who are experiencing financial hardship." But the citation to the BOA website makes no mention of a requirement that the loan be in actual default. Appellants allege that HAMP was "nationally advertised," and that they checked the

BOA website before calling for information. Yet, they do not allege they were experiencing financial hardship that placed them in imminent danger of default; instead, they allege they were "ready, willing, and able" to make all further payments on the loan. It is unreasonable to interpret Sharonda's statement as advising appellants to purposefully create the impression of being in financial distress by stopping payments on the loan, as opposed to advising them that HAMP is meant to help homeowners in actual financial distress that already has caused a default.

Appellants also claim that Sharonda had a duty to disclose that appellants' super jumbo loan did not qualify under HAMP, whether or not it was in default. (See *Phu Van Nguyen v. BAC Home Loan Services, LP* (N.D. Cal., Oct. 1, 2010, C-10-01712 RMW) 2010 WL 3894986 [HAMP applies to loans with unpaid principal balance of less than or equal to $729,750 for one unit].) As we explained, there is a split of authority on whether a lender or servicer has a duty of care to borrowers with regard to loan modifications. (See *Alvarez v. BAC Home Loans Servicing, LP* (2014) 228 Cal.App.4th 941, 948 [duty of care exists if lender agrees to consider modification]; *Jolley v. Chase Home Finance, LLC, supra*, 213 Cal.App.4th 872 [same]; but see *Lueras v. BAC Home Loans Servicing, LP, supra*, 221 Cal.App.4th at p. 67 [there is no duty "to offer, consider or approve" loan modification, but there is duty not to misrepresent status of application for modification].)

Unlike *Jolley v. Chase Home Finance, LLC, supra*, 213 Cal.App.4th 872, 900, on which appellants principally rely, this is not the case of a borrower at the mercy of a lender or servicer processing an application for a loan modification. There is no reason to impose a duty to disclose additional HAMP requirements since appellants do not allege that Sharonda had specific information about appellants' outstanding loan amount, and the allegations are insufficient to raise an inference that BOA or its servicer agreed to consider appellants for a loan modification during their preliminary call for information and before they had actually applied for a loan modification.

The only injury appellants claim as a result of the alleged misrepresentation about HAMP is an unidentified decrease of their credit rating. But appellants do not allege they were unaware that their credit scores would suffer in the event of default; nor was

Sharonda's statement a guarantee that appellants would be approved for a loan modification. Thus, appellants necessarily took a risk in defaulting on their loan. While they claim they would have been able to continue making loan payments, appellants do not allege whether they attempted to bring the loan current at any time after realizing they did not qualify under HAMP. The allegations in the operative complaint are insufficient to support the conclusion that appellants' ability to protect their own interests "was practically nil," or that they were at the mercy of BOA or its servicer at the time they made the decision to default. (See *Jolley v. Chase Home Finance, LLC*, *supra*, 213 Cal.App.4th at p. 900.)

The allegations are insufficient to state causes of action for fraud and negligent misrepresentation.

II

The elements of a cause of action for breach of contract and for breach of the implied covenant of good faith and fair dealing are similar. "The essential elements of a breach of contract claim are: '(1) the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to plaintiff.' [Citation.]" (*Hamilton v. Greenwich Investors XXVI, LLC* (2011) 195 Cal.App.4th 1602, 1614.) The implied covenant of good faith and fair dealing rests upon the existence of some specific contractual obligation. (*Foley v. Interactive Data Corp.* (1988) 47 Cal.3d 654, 683–684, 689–690.) "The covenant of good faith is read into contracts in order to protect the express covenants or promises of the contract, not to protect some general public policy interest not directly tied to the contract's purpose." (*Id*. at p. 690.)

Appellants argue that respondents breached the loan agreement by performing acts that diminished the value of appellants' property, such as inflating property values and making risky loans. The only contract term appellants cite is the requirement in the deed of trust that the borrower protect the value of the security for the lender's benefit. Appellants contend that implicit in this term is a reciprocal requirement that the lender not diminish the value of appellants' property.

California law does not require mutuality of every term and provision, so long as each party has made binding obligations in consideration for their respective promises. (1 Witkin, Summary of Cal. Law (10th ed. 2005) Contracts, § 225, pp. 260–261 ["doctrine of mutuality of obligation requires that the promises on each side be *binding obligations* in order to be consideration for each other"]; see also 2 Corbin on Contracts (rev. ed. 1995) § 6.1, p. 197 ["[S]ymmetry is not justice and the so-called requirement of mutuality of obligation is now widely discredited"].)

Courts must interpret contracts to give effect to the mutual intention of the parties at the time the contract was made. (Civ. Code, § 1636.) "A contract extends only to those things concerning which it appears the parties intended to contract. Our function is to determine what, in terms and substance, is contained in the contract, not to insert what has been omitted. We do not have the power to create for the parties a contract which they did not make and cannot insert language which one party now wishes were there." (*Principal Mutual Life Ins. Co. v. Vars, Pave, McCord & Freedman* (1998) 65 Cal.App.4th 1469, 1478.) Accordingly, "[i]t is well settled that '"[a] covenant will not be implied against express terms or to supply a term on a matter *as to which the contract is intentionally silent*."'" (*Hillsman v. Sutter Community Hospitals* (1984) 153 Cal.App.3d 743, 754.)

The success of the borrower's investment "is not a benefit of the loan agreement" which the lender is under a duty to protect. (*Nymark v. Heart Fed. Savings & Loan Assn.*, *supra*, 231 Cal.App.3d at p. 1096, quoting *Wagner v. Benson* (1980) 101 Cal.App.3d 27, 34; see also *Graham v. Bank of America, N.A.*, *supra*, 226 Cal.App.4th at p. 607.) Nor is the borrower's investment the subject of a deed of trust, whose practical effect is to create a lien on the borrower's property in favor of the lender or beneficiary. (*Herrera v. Federal National Mortgage Assn.* (2012) 205 Cal.App.4th 1495, 1510.) We cannot imply a covenant of good faith and fair dealing that imposes a duty to protect the borrower's investment in the collateral when the success of the borrower's investment is not an actual benefit of the loan agreement or deed of trust. (See *Wagner v. Benson*, at p. 34.)

Appellants' causes of action for breach of contract and breach of covenant of fair dealing also fail because a party to a contract cannot compel performance while in default. (*Durell v. Sharp Healthcare* (2010) 183 Cal.App.4th 1350, 1367.) Excuses for nonperformance must be pleaded specifically. (*Ibid*.) A debtor's performance of an obligation may be excused "[w]hen the debtor is induced not to make it, by any act of the creditor intended or naturally tending to have that effect, done at or before the time at which such performance or offer may be made, and not rescinded before that time." (Civ. Code, § 1511, subd. (3).)

Appellants allege that they were current on the loan through September 2010 and were "ready, willing, and able to make each and every payment thereafter, but for the promises[,] . . . representations and instructions that as a condition precedent to being considered for a loan modification or short sale . . . [appellants] must be in default." They assert that the representations induced them to stop making payments on the loan and gave rise to promissory estoppel.

'"Promissory estoppel applies whenever a "promise which the promissor should reasonably expect to induce action or forbearance on the part of the promisee or a third person and which does induce such action or forbearance" would result in an "injustice" if the promise were not enforced. [Citation.]' [Citation.] 'The elements of a promissory estoppel claim are "(1) a promise clear and unambiguous in its terms; (2) reliance by the party to whom the promise is made; (3) [the] reliance must be both reasonable and foreseeable; and (4) the party asserting the estoppel must be injured by his reliance." [Citation.]' [Citation.]" (*Advanced Choices, Inc. v. Department of Health Services* (2010) 182 Cal.App.4th 1661, 1671–1672.)

Appellants variously allege that during their first phone call to inquire about HAMP relief, Sharonda stated the bank would "consider" or "offer" a loan modification only if the loan was in default. However, "[e]stoppel cannot be established from . . . preliminary discussions and negotiations." (*National Dollar Stores, Ltd. v. Wagnon* (1950) 97 Cal.App.2d 915, 919.) Nor, as we explained, have appellants alleged facts that support reasonable reliance. Appellants do not allege why they needed a loan

modification in the first place, or why they could not have ridden out the Great Recession by continuing to make payments on their loan.

The allegations in the fourth amended complaint do not excuse appellants' default on the loan and do not state a cause of action for breach of contract or breach of the covenant of good faith and fair dealing.

III

Appellants' claim for unfair business practices in violation of the UCL is based on allegations that "the Defendants, . . . acting in concert, more or less as would a 'Bank Cartel' . . . create[d] a period of artificial appreciation in value of . . . all property against which they and other lenders like them were making and securitizing loans. At the same time, they knew or should have known that by artificially inflating values through their own appraisers what they were perpetuating was a fraud, a 'Ponzi Scheme.' . . . Through the use of their own appraisers hired to support the artificial valuation of . . . properties throughout . . . the United States, these Defendants, and others like them, knew they were creating an environment of artificial appreciation in values sufficient to entice and convince Plaintiffs, and others like them, to borrow against the value in their properties and pay to the Defendants, and others like them, money of a monthly basis that stretched the limits of actual affordability." Appellants allege they would not have borrowed or made monthly payments had they known of the fraudulent scheme, of which they claim they could not have become aware until the 2011 FCIC report. Appellants assert that "the Bank Cartel" caused them "and others similarly situated" to make payments on loans, pay property taxes, and expend money that "would not have been spent in such amounts." They also claim damage to their credit rating and loss of their home as a result.

Claims under the UCL must be brought within four years. (Bus. & Prof. Code, § 17208.) Respondents contend that, like the fraud claims, the UCL claim is time barred, and appellants rely on the delayed discovery rule to postpone accrual of their cause of action. Since the UCL statute of limitation is longer and it is possible to construe

appellants' complaint as alleging damages occurring as late as 2011, we will consider the claim on the merits.

"[S]ince the passage of Proposition 64 in 2004, a private individual has standing to bring a UCL action only if he or she 'has suffered injury in fact and has lost money or property as a result of the unfair competition.' (Bus. & Prof. Code, § 17204.)" (*Troyk v. Farmers Group, Inc.* (2009) 171 Cal.App.4th 1305, 1339.) "Thus, a private person has no standing under the UCL unless that person can establish that the injury suffered and the loss of property or money resulted from conduct that fits within one of the categories of 'unfair competition' in section 17200." (*Daro v. Superior Court* (2007) 151 Cal.App.4th 1079, 1098.) A plaintiff has not suffered economic injury "as a result of" the unfair competition unless the injury was "caused by" the defendant's acts. (*Kwikset Corp. v. Superior Court* (2011) 51 Cal.4th 310, 326.)

Appellants appear to rely on aiding and abetting principles to establish the banking industry's joint liability to them, and to the general public, for all damages ensuing from the real estate market crash. Their allegations are insufficient to establish such liability.

"A defendant can be held liable as a cotortfeasor on the basis of acting in concert only if he or she knew that a tort had been, or was to be, committed, and acted with the intent of facilitating the commission of that tort. [Citation.]" (*Gerard v. Ross* (1988) 204 Cal.App.3d 968, 983.) "[A]iding and abetting . . . necessarily requires a defendant to reach a conscious decision to participate in tortious activity for the purpose of assisting another in performing a wrongful act. A plaintiff's object in asserting such a theory is to hold those who aid and abet in the wrongful act responsible as joint tortfeasors for all damages ensuing from the wrong." (*Howard v. Superior Court* (1992) 2 Cal.App.4th 745, 749.)

Appellants conclusorily allege that BOA, Countrywide, Chase, and Aurora, the defendants named in the UCL cause of action, and "other members of the Bank Cartel," named as Doe defendants, acted "in concert," as set forth in the FCIC report and as alleged in the government's complaint in intervention in *United States v. Countrywide*

Fin. Corp., supra, 961 F.Supp.2d 598. A demurrer does not admit the truth of such conclusions. (*City of Dinuba v. County of Tulare*, *supra*, 41 Cal.4th at p. 865.)

Appellants cannot rely on judicial notice of the documents they reference to provide a factual basis for this conclusion. '"Taking judicial notice of a document is not the same as accepting the truth of its contents or accepting a particular interpretation of its meaning.' [Citation.] While courts take judicial notice of public records, they do not take notice of the truth of matters stated therein. [Citation.] 'When judicial notice is taken of a document, . . . the truthfulness and proper interpretation of the document are disputable.' [Citation.]" (*Herrera v. Deutsche Bank National Trust Co.* (2011) 196 Cal.App.4th 1366, 1375.)

Assuming that appellants have sufficiently alleged that Countrywide and WaMu knowingly inflated the value not only of appellants' home, but of other properties as well, there are no factual allegations from which we can infer they did so "for the purpose of assisting" each other in defrauding the general public, rather than as a result of self-interest and free competition in the marketplace. To conclude further that they were part of a "cartel" would require allegation of facts showing a conspiracy to fix prices and a price-related agreement. (*Fisher v. City of Berkeley* (1984) 37 Cal.3d 644, 665; see also *Exxon Corp. v. Superior Court* (1997) 51 Cal.App.4th 1672, 1680 [cartels are "agreements among competitors which restrain competition among enterprises at the same level of distribution"]; *Bell Atlantic Corp. v. Twombly* (2007) 550 U.S. 544, 556–557 [in anti-trust context, "an allegation of parallel conduct and a bare assertion of conspiracy will not suffice" because "[w]ithout more, parallel conduct does not suggest conspiracy"].) There are no such allegations in the operative complaint.

Without a basis for holding respondents liable as joint tortfeasors, appellants are presented with the causation problem we discussed in relation to their fraud claims. They do not establish a clear nexus between Countrywide's allegedly fraudulent conduct and the damages they claim because, as they allege, other homeowners suffered similar damages without taking loans from Countrywide. (See *Bank of America Corp. v. Superior Court*, *supra*, 198 Cal.App.4th at p. 873.) The nexus between Countrywide's

appraisal and appellants' damages also is attenuated because appellants relied on WaMu's even higher appraisal of the property to set the original sale price and to additionally encumber their home with a line of credit. To the extent appellants' voluntary default led to the short sale, we agree with the trial court that appellants cannot state that they lost their equity because of Countrywide's appraisal. Appellants, therefore, lack standing to sue under the UCL.

IV

Appellants do not specifically challenge the denial of further leave to amend. In any event, the trial court did not abuse its discretion in sustaining the demurrer to the fourth amended complaint without leave to amend because it could reasonably conclude that they were unable to amend it any further. (See *Tucker v. CBS Radio Stations, Inc.* (2011) 194 Cal.App.4th 1246, 1256 ["Where several successive amended complaints have been vulnerable to demurrer on the same ground, the trial court may reasonably find the complaint is incapable of being amended to state a cause of action, and it is not an abuse of discretion to deny leave to amend"].)

Appellants argue the court abused its discretion in denying in part their motion to compel further document production from BOA regarding collection and enforcement of the loan, the procedures manual used to service the loan, and definitional dictionary of transaction codes. "A party seeking to compel discovery must . . . 'set forth specific facts showing good cause justifying the discovery sought.' [Citations.] To establish good cause, a discovery proponent must identify a disputed fact that is of consequence in the action and explain how the discovery sought will tend in reason to prove or disprove that fact or lead to other evidence that will tend to prove or disprove the fact." (*Digital Music News LLC v. Superior Court* (2014) 226 Cal.App.4th 216, 224.)

In denying in part the motion to compel, the trial court found appellants had failed to show a "particularized need" for some of the documents they sought. Appellants argue the additional documents they sought may contain information relevant to their claim that BOA "wrongfully induced [them] into believing they would be entitled to a loan modification or partial debt forgiveness." They fail to cite to places in the record where

they made that showing in the trial court. Our review of the record indicates that neither the motion to compel nor the supporting separate statement clearly established a need for these documents in connection with a promised loan modification. While appellants' default was alleged in the first and second complaints, the operative complaints during the pendency of the motion to compel, no cause of action asserted in those complaints was expressly based on those facts. The trial court did not abuse its discretion in denying the motion to compel production of these additional documents.

DISPOSITION

The judgment of dismissal is affirmed. Respondents are entitled to their costs on appeal.

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

EPSTEIN, P.J.

We concur:

WILLHITE, J.

MANELLA, J.